

ROBERT A. BORST
Claimant

Docket No. 1,076,593

Claimant requests review of the August 4, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

John J. Bryan, of Topeka, Kansas and Stuart N. Symmonds, of Emporia, Kansas, appeared for the claimant. Matthew M. Hogan, of Kansas City, Missouri, appeared for the insurance carrier. Michael T. Halloran, of Overland Park, Kansas, appeared for respondent.

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from June 30, 2016, with exhibits attached and the documents of record filed with the Division.

The ALJ denied claimant's motion regarding underpayment of past temporary total disability (TTD) benefits and his motion for an order to compel the insurance adjuster to appear for a deposition. TTD was ordered paid at \$25 per week until claimant is deemed by his authorized treating physician to have reached maximum medical improvement (MMI) or until further order.

Claimant appeals, arguing the ALJ incorrectly calculated his average weekly wage (AWW) and, thus, TTD was ordered paid at a lower and incorrect rate. Claimant contends he is entitled to benefits according to the Workers Compensation Act (Act) and any additional benefits contracted for between the parties in excess of the benefits provided under the Act.

Claimant contends he only worked 16 weeks prior to his accident, therefore, those are the only weeks that should be used to calculate his AWW and the expenses incurred should not be deducted in calculating the AWW. Claimant argues there is no provision under the Act for deducting expenses incurred prior to the period during which an AWW is calculated. Based upon the incorrect calculation of the AWW, claimant contends he was underpaid TTD.

Claimant, who is also respondent, contends he is entitled to choose his own treating physician, and he is entitled to depose the insurance claims adjuster at a discovery deposition regarding medical benefits and unavailability of medical treatment requested by claimant. Claimant contends:

1. He was brought under the Act in 2013 when the insurance carrier filed an election with the Division.
2. The insurance carrier issued a workers compensation insurance policy listing claimant as insured, represented that claimant was covered and accepted premiums for the coverage under the Act.
3. He is covered and entitled to benefits.
4. The benefit rate should be \$610 per week rather than \$25 per week commencing November 9, 2015.
5. He is allowed to select his own physician because he is also the respondent.
6. Claimant is legally entitled to depose the workers compensation insurance claims adjuster at a discovery deposition.

The insurance carrier argues claimant's motion to take the deposition of the insurance adjuster should be denied and that claimant failed in his burden of proving the average weekly wage appropriate to his date of accident.

The issues on appeal are:

1. Does the Board have jurisdiction over this appeal from a preliminary hearing order? If so,

- A. Does the Workers Compensation Act apply?
- B. Was claimant's average weekly wage correctly calculated by the ALJ?
- C. Does claimant have the right to take the discovery deposition of the adjuster?

FINDINGS OF FACT

Claimant is self-employed with SouthWind Lawn & Landscaping. Claimant is a sole proprietor, and the only full time employee. This is a seasonal business, so he has no regular employees, and hires people when he needs to. Claimant testified he typically has work from April through the end of October or the first of November. He has no work from December to March. Claimant was physically doing no work from January 1, 2015, to March 26, 2015. The money claimant receives for the work he performs goes into a checking account, which is a combination of his personal account and business account.

Claimant contends he has workers compensation coverage and is covered as the employer and an employee because both he and the insurance company signed an election. Claimant pays insurance premiums based upon \$41,200 in income per year. Claimant would like to depose the insurance adjuster and possibly the insurance agent to get clarification of the insurance policy and coverage.

Claimant has a daily rate of \$650, but also takes jobs by the hour, for which he charges \$65 an hour. If he has help on a job, those individuals will receive \$25 to \$30 an hour and are considered seasonal. He performs jobs on bid. On the jobs he does by the hour he is paid for the materials he supplies. Claimant tries not to hire any employees.

On July 17, 2015, claimant suffered an injury to his back while reaching to pick up a rolled hose. Claimant sought medical treatment with his primary care physician and then the insurance carrier sent him to Dr. Fotopoulos. Claimant received injections from Dr. Bruning and Dr. Fotopoulos. Claimant testified that he continued working until November 9, 2015, when Dr. Fotopoulos instructed him to stop working.

Claimant's election to come under the Act was initially filled out March 15, 2013, and has been renewed every year since then. This election must be signed by the insurance company. Claimant acknowledged that, as respondent, he has taken jobs where he was required to provide a workers compensation certificate of insurance.

- Q. During the times that you've been in business, have you ever, to your knowledge, not been covered by work comp insurance?

...

A. Since I've been in business I have always elected to come under the Act and carry work comp for myself. Every year I've been in business.

Q. Have you ever cancelled that election?

A. I have not.¹

Claimant received a refund on his insurance premiums in 2015, after an audit, because his wages were less than anticipated. Claimant is unable to say how much he made each calendar week in 2015 or what his expenses were. Claimant is not sure if the certificate for insurance for the company had his name on it.

TTD was paid from November 9, 2015, to the present at \$141.40 per week. Claimant contends the rate should be \$610 per week, which means there would be an underpayment.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2015 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2015 Supp. 44-534a(a)(1)(2) states:

(a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the

¹ P.H. Trans. at 46.

notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

The parties dispute the application of the Act to this matter. However, in the Order, the ALJ stated:

K.A.R. 51-3-8 lists the question as to coverage under the act is specifically as a topic of consideration at "the first hearing". A preliminary hearing qualifies as a "first hearing". Given the "coverage under the act question" is not listed as subject to board review, yet is intrinsically [sic] jurisdictional creates a legal dilemma [sic] as to review of coverage issues—at least at the preliminary hearing stage. To attempt

to avoid that delemma, [sic] this Court will make no findings in this order as to the issue of Claimant's election under the Act or coverage between Claimant and his insurance company. Instead, the Court will proceed with the understanding that Robert Borst, as Claimant and Robert Borst as Respondent have agree [sic] for purposes of this preliminary hearing that they are both under the Act. Hence, the focus now turns first to TTD and wages.²

The ALJ appears to have determined coverage under the Act based upon a stipulation of the parties. In addition, the insurance carrier indicated that coverage is not an issue, at least for this appeal. Under K.S.A. 2015 Supp. 44-534a, the Board does not take jurisdiction of this question. Therefore, this ruling of the ALJ remains in full force and effect.

Likewise, the Order notes the lack of a subpoena against any prospective witness, finding the question "not ripe." As the ALJ did not rule on this question, this Board Member will not address an issue not determined by the ALJ at a preliminary hearing.

K.S.A. 2015 Supp. 44-511(b) states:

(b) (1) Unless otherwise provided, the employee's average weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be.

(2) If actually employed by the employer for less than one calendar week immediately preceding the accident or injury, the average weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average weekly wage so determined shall not exceed the actual average weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation.

(3) The average weekly wage of an employee who performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the sum of the average weekly wages of such employee paid by each of the employers.

(4) In determining an employee's average weekly wage with respect to the employer against whom claim for compensation is made, no money or additional compensation paid to or received by the employee from such employer, or from any source other than from such employer, shall be included as wages, except as provided in this section. No wages, other compensation or benefits of any type,

² ALJ Order (Aug. 4, 2016) at 3.

except as provided in this section, shall be considered or included in determining the employee's average weekly wage.

(5) (A) The average weekly wage of a person serving on a volunteer basis as a duly authorized law enforcement officer, ambulance attendants and drivers as provided in subsection (b) of K.S.A. 44-508, and amendments thereto, firefighter or members of regional emergency medical response teams as provided in K.S.A. 48-928, and amendments thereto, who receives no wages for such services, or who receives wages which are substantially less than the usual wages paid for such services by comparable employers to employees who are not volunteers, shall be computed on the basis of the dollar amount closest to, but not exceeding, 112½% of the state average weekly wage.

(B) The average weekly wage of any person performing community service work shall be deemed to be \$37.50.

(C) The average weekly wage of a volunteer member of the Kansas department of civil air patrol officially engaged in the performance of functions specified in K.S.A. 48-3302, and amendments thereto, shall be deemed to be \$476.38. Whenever the rates of compensation of the pay plan for persons in the classified service under the Kansas civil service act are increased for payroll periods chargeable to fiscal years commencing after June 30, 1988, the average weekly wage which is deemed to be the average weekly wage under the provisions of this subsection for a volunteer member of the Kansas department of civil air patrol shall be increased by an amount, adjusted to the nearest dollar, computed by multiplying the average of the percentage increases in all monthly steps of such pay plan by the average weekly wage deemed to be the average weekly wage of such volunteer member under the provisions of this subsection prior to the effective date of such increase in the rates of compensation of the pay plan for persons in the classified service under the Kansas civil service act.

(D) The average weekly wage of any other volunteer under the workers compensation act, who receives no wages for such services, or who receives wages which are substantially less than the usual wages paid for such services by comparable employers to employees who are not volunteers, shall be computed on the basis of the usual wages paid by the employer for such services to employees who are not volunteers, or, if the employer has no employees performing such services for wages who are not volunteers, the average weekly wage shall be computed on the basis of the usual wages paid for such services by comparable employers to employees who are not volunteers. Volunteer employment is not presumed to be full-time employment.

In the Order, the ALJ addressed the question of claimant's AWW. In doing so, the ALJ considered the version of K.S.A. 44-511(b)(5) in effect prior to the overhaul of the Act on May 15, 2011. The version of the Act dealing with how to calculate an AWW was modified significantly with the 2011 changes to the Act.

K.S.A. 2015 Supp. 44-551(l)(2)(A) states:

(2) (A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

The use of an invalid statute by an ALJ exceeds his jurisdiction. As such, this issue is remanded to the ALJ for determination under the version of K.S.A. 44-511 in effect on July 17, 2015.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order is remanded to the ALJ for the determination of claimant's average weekly wage under the appropriate version of K.S.A. 44-511. The remainder of the Order remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven M. Roth dated August 4, 2016, is remanded for a determination of claimant's average weekly wage under K.S.A. 2015 Supp. 44-511.

³ K.S.A. 2015 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of October, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

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